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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re OSCAR JORGE VARGAS

on Habeas Corpus.

G044568

(Super. Ct. No. 00NF2596)

O P I N I O N

Original proceedings; petition for a writ of habeas corpus to file a late notice of appeal. Petition granted.

Lynelle K. Hee under appointment by the Court of Appeal for petitioner.

Kamala D. Harris, Attorney General, and Gary W. Schons, Assistant Attorney General, for Respondent.

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THE COURT:*

Petitioner, Oscar Jorge Vargas (Vargas) seeks relief from the failure to file a timely notice of appeal. The petition is granted.

In October 2000, petitioner was charged with one count of vandalism of religious property. In December 2000, the court found petitioner was a mentally incompetent person pursuant to Penal Code section 1368. Petitioner was retained and treated at Metropolitan State Hospital until November 2002, when the court found him not to be a mentally incompetent person under Penal Code section 1368, and criminal proceedings against him were reinstated.

In February 2003, petitioner pled not guilty by reason of insanity to vandalism of religious property. In March 2003, the court found him guilty of the charged offense, and further found that at the time of the offense he was not competent. The court also found that he had not recovered his sanity and was still a danger to others. The court ordered petitioner to a mental hospital for a maximum term of three years, and he was subsequently placed in Patton State Hospital.

Petitioner's commitment period was further extended, and eventually became due to expire in May 2010. However, in January 2010, the People filed a petition to extend his commitment until May 18, 2012. After a trial which was held on May 18, 2010, the court granted the People's petition to extend petitioner's commitment until May 18, 2012.

Petitioner contends he was never told either by his attorney Ernest Eady, or by the court, of his right to appeal. Nor was he advised that if he wanted to appeal he had to file a notice of appeal within 60 days of the court's judgment. He claims he was not advised of these rights until August 2, 2010, or when he next met with Eady to discuss his case. It was on August 2, 2010, where Eady asked him for the first time, if he wanted

* Before Rylaarsdam, Acting P.J., O'Leary, J., and Moore, J.

to appeal the court's decision of May 18, 2010. He told Eady to file a notice of appeal on his behalf.

Eady indicates that on August 2, 2010, he spoke with petitioner, and during their conversation he asked petitioner if he wanted to appeal the court's ruling of May 18, 2010. As a result of their conversation, Eady prepared a notice of appeal on petitioner's behalf, and he attempted to file it with the Superior Court on August 3, 2010. On August 4, 2010, the court marked the appeal received but not filed.

The Attorney General does not oppose petitioner's request for relief to file a late notice of appeal without the issuance of an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728.)

The principle of constructive filing of a notice of appeal should be applied in situations in which a criminal defendant requests trial counsel to file a notice of appeal on his behalf, and counsel fails to do so in accordance with the law. (*In re Benoit* (1973) 10 Cal.3d 72, 87-88.) This is because a trial attorney who has been asked to file a notice of appeal on behalf of a client has a duty to file a proper notice of appeal, or tell the client how to file it himself. In this case, Vargas's attorney failed to file a proper notice of appeal in accordance with the law, and failed to properly advise him how to do so.

The petition for relief is granted. The Clerk of the Superior Court is directed to file the notice of appeal that was marked "received but not filed" on August 4, 2010. Further proceedings, including the preparation of the record on appeal, are to be conducted according to the applicable rules of court. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith.